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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 284

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD AND BERNHARD-ALTMANN TEXAS CORPORATION, *Respondents.*

On Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION, PETITIONER

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INDEX

Page

I. The Board's brief concedes that only exclusive recognition need be withdrawn 2

II. Authority upon which Board brief relies finds nothing illegal in a union protecting the standards of its members by forcing an employer to maintain union wages and other conditions of employment for a non-union majority 6

III. There are no decisions by the National Labor Relations Board other than that in the instant case holding that exclusive recognition of a minority union without more constitutes an unfair labor practice or that employee efforts to secure such recognition do not constitute protected concerted activity 11

IV. The legislative history of the various appropriate riders and the subsequent Landrum-Griffin Act amendments do not establish that Congress meant by Section 8 (a) (1) and (2) or Section 8 (b) (1) (A) to ban exclusive recognition of minority unions 15

CITATIONS

CASES:

Guy F. Atkinson Co., 90 N.L.R.B. 143, enforcement denied on other grounds, 195 F. 2d 141 (C.A. 9) .. 11

Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 239 ..... 4, 5

Dixie Bedding Mfg. Co. v. N.L.R.B., 5th Cir., 1959, 268 F. 2d 901 11

Ekco Products Co., 1957, 117 N.L.R.B. 137 14

Elastic Stop Nut Corp. v. N.L.R.B., 8th Cir., 1944, 142 F. 2d 37 12

Daniel Hamm Drayage Co., 84 N.L.R.B. 458, enforced 5th Cir., 1951, 185 F. 2d 1020 11

Hoover Co. v. N.L.R.B., 6th Cir., 1951, 191 F. 2d 380 ..... 13, 14

N.L.R.B. v. Brashear Freight Lines, 8th Cir., 1941, 119 F. 2d 379 13

N.L.R.B. v. Buzza Cardozo, 9th Cir., 1953, 205 F. 2d 889, certiorari denied, 346 U.S. 923 13

Page

N.L.R.B. v. Corning Glass Works, 1st Cir., 1953, 204 F. 2d 422 12
N.L.R.B. v. Electronics Equipment Co., 2nd Cir., 1952, 205 F. 2d 296 13
N.L.R.B. v. Masters-Lake Success, Inc., 2nd Cir., 1961, 47 L.R.R.M. 2607 11
N.L.R.B. v. National Container Corp., 2nd Cir., 1954, 211 F. 2d 525 11
N.L.R.B. v. Pennsylvania Greyhound Lines, 303 U.S. 261 12
National Motor Bearings Co., 5 N.L.R.B. 409, enforced on this point, 9th Cir., 1939, 105 F. 2d 652 11
Safeway Stores, Inc., 111 N.L.R.B. 968 11
John B. Shriver Co., 103 N.L.R.B. 23 11
Stein and Calder, 46 N.L.R.B. 129 11
Sunbeam Corp., 99 N.L.R.B. 546 11
District 50, United Mine Workers v. N.L.R.B., 4th Cir., 1956, 234 F. 2d 565 11

STATUTES:

Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401, *et seq.* 16

National Labor Relations Act, 61 Stat. 136, 29 U.S.C. 150, *et seq.*

Section 8 (a) (1) 15
Section 8 (a) (2) 15
Section 8 (a) (3) 9, 11
Section 8 (b) (1) (A) 15
Section 8 (b) (2) 9
Section 8 (b) (7) 6
Section 8 (f) 16

MISCELLANEOUS:

Brown, Emily Clarke, The New Collective Bargaining in Mass Production: Methods, Results, Problems, 47 Journ. Pol. Econ. 30 (February 1939) 10
89 Cong. Rec. 6566-6567 15
Cox, Archibald, Law and the National Labor Policy, pp. 10-15, 23-31 ..... 6, 7, 8, 10
U. S. Dept. of Labor, Collective Bargaining in the Basic Steel Industry, 1961, pp. 232-233 10

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REPLY BRIEF FOR THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION, PETITIONER

We find nothing which requires answer in the Board's brief respecting our points that good faith is the proper standard for determining majority or, if it is not, that the admitted union majority which existed at the time the October 10, 1957 contract was signed could not be destroyed by any technical viola-

tion of law which might have inhered in a mistake as to the true majority on August 30, 1957. If we are correct on either of these points, there can be no possible basis for setting aside in any part the October 10, 1957 contract between the Union and the Employer.

I.

The Board's brief concedes that only exclusive recognition need be withdrawn.

Even if there were any defect in majority on October 10, 1957, at most the exclusive recognition clause in the agreement should be set aside, leaving the contract between the Union and the Employer otherwise in full force and effect. The Board's brief repeatedly states (pp. 2, 5-6, 8, 9, 27, 30-31, 33, 34) that the mistake as to majority here made carries no penalty but merely bars exclusive recognition. Thus, the Board's brief states (p. 34): "Here the unlawful clause is the clause granting exclusive recognition, and in practical effect this is the clause set aside by the Board's order * * *." But the Board's order by its terms expressly sets aside the whole contract (R. 9-11) and also enjoins the Employer from dealing with the Union as the representative of a single employee, even its own members, on any matter, whether grievances or otherwise, until certified (R. 9).

The Board's brief (p. 6, n. 4) likewise states that "The Board's order, however, did not require the Company to vary or abandon any term or condition of employment established in the performance of the agreement." But it left the employer free to do so. The agreement conferred contractual rights to improved wages (R. 99-100), hours of employment (R. 99), no discharge without good cause (R. 101),

fair distribution of work (R. 101-102), health, welfare, hospital and surgical benefits (R. 103-104), with a grievance and arbitration system for enforcement (R. 109-110), all of which fall if the contract is declared invalid as to the only two parties to it. The contract expressly provides (R. 110):

> "Neither party shall institute any action or proceeding in court of law or equity, state or federal, other than to compel arbitration, as provided in this agreement, or to enforce the award of an arbitrator. This provision shall be a complete defense to any action or proceeding instituted contrary to this agreement."

To set aside this contract as to the Union is to deprive employees of any manner of enforcing it. The Board's statement that the order protects the substantive rights of employees (Board Br., p. 34) is unrealistic because the contract never accorded employees rights except through the Union.

The Board's brief, by failing to defend these various provisions in the Board's order and arguing that, in practical effect, only a withdrawal of exclusive recognition ensues from a good faith mistake, in substance confesses error as to the breadth of the order here issued. If any provision in the October 10, 1957 contract is to be set aside, it can only be the exclusive recognition clause. All the substantive terms of the contract must be left in full force and effect as binding contractual obligations between the Union and Employer. The Employer and the Union must continue to be able to process grievances and enforce the arbitration procedures of the contract, with the Employer still contractually obligated to deal with the Union as

the representative of any employee who seeks to have the Union represent him in processing grievances.

This is the concept of withdrawal of exclusive recognition which this Court adopted in the case of *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 239. There Subdivision (g) of Paragraph one of the Board's order required the employers to cease recognizing the Brotherhood "as the exclusive representative of their employees." This Court in upholding this provision stated (305 U.S., at p. 239):

> "We construe subdivision (g) as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the act."

The Board in its brief (p. 33) attempts to distinguish the *Consolidated Edison* case on the ground that the contracts there involved did not make the union the exclusive representative for purposes of collective bargaining. In the *Consolidated Edison* case the Board had found that although the contracts recited only that the employer recognized the union as the agent of its members, the contracts had been entered into and treated by the employer as exclusive recognition contracts at a time when two independent labor organizations were seeking recognition. In regard to exclusive recognition the Board stated (4 N.L.R.B. 71, 93):

> "Carlisle [who was in charge of the employer's labor relations] testified that the contracts were applicable to all employees and were exclusive collective bargaining contracts—i.e., that the respondent would not enter into collective bargaining agreements with any other labor organization dur-

> ing the existence of the contracts. He thus in effect admitted that he recognized and entered into contracts with the I.B.E.W. locals as the exclusive bargaining representatives of the respondents' employees at a time when he did not know the size of the membership * * *."

This finding was not set aside by either the court of appeals or this Court.

The contracts involved in the *Consolidated Edison* case are printed in the Record in that case, at pp. 1394-1405 and 1419-1430. Although the recognition and scope clauses accord the union recognition only as the representative of its members, the provisions as to all substantive terms, such as wage increases (R. 1397-1398), work week and overtime (R. 1395-1396), seniority (R. 1399) and vacations (R. 1396) are by their terms applicable to all employees. Only the adjustment of grievance and arbitration provisions (R. 1400) are by their terms applicable only to union members.

In refusing to set aside these contracts, even though the parties, at the time two rival unions were competing for recognition, had treated the contracts as according exclusive recognition, and Consolidated Edison had committed substantial acts of discrimination and interference, this Court set a precedent applicable here, as we have argued more fully in our main brief, pp. 21, 26, 37, 67, 96, 111-113.

II.

Authority upon which Board brief relies finds nothing illegal in a union protecting the standards of its members by forcing an employer to maintain union wages and other conditions of employment for a non-union majority.

The Board's brief (p. 37, n. 24) refers this Court to a monograph by Archibald Cox entitled *Law and the National Labor Policy*, pp. 10-15, 23-31, for "a more elaborate exposition of the philosophy underlying" the analysis presented by the Board with respect to the problem of picketing by a minority union for exclusive recognition. This monograph takes the position that despite the concern of the law with preserving to each employee the right to freedom of choice regarding union representation, unions may protect the standards of their members not alone by achieving majority designations but also, if they cannot organize the majority, by driving the product of non-union labor off the market or driving the wages and working conditions of non-union employees up to the union level, when this is essential to preserve union standards. Thus, in commenting on Section 8 (b) (7) of the National Labor Relations Act, enacted subsequent to events here involved, the monograph states (at pages 27-28):

> "Banning organizational picketing after an N.L.R.B. election partially rejects the struggle for life, for it prefers the nonunion employees' interest in self-determination over the union's interest in spreading its organization as a means of protecting its wage scale and labor standards. Suppose, however, that a union were to picket for the avowed purpose of publicizing the low wages paid in an establishment, without becoming the bargaining representative, in order to compel the

owner to raise his wages to the union scale or else to prevent the distribution of the low-cost, nonunion goods in direct competition with the product of union labor. NLRA section 8 (b) (7) prohibits picketing only

> where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees or . . . the employees of an employer to accept or select such labor organization as their collective bargaining representative . . .

"The very few men close to the drafting of the Conference Report who understood this problem had no common intention—perhaps 'had conflicting intentions' would be a better phrase. Presumably, the N.L.R.B. will follow the decisions under section 8 (b) (4) (C) which hold that picketing in support of a demand which is customarily made in collective bargaining is picketing for recognition. I am inclined to think that the rule is wrong in principle, and it is opposed by judicial rulings distinguishing organizational picketing from picketing to protest competition of non-union goods. The prohibition seeks to protect the employees' decision concerning union representation, not their freedom to work at substandard wages without reprisal from those whom they injure. The union's objective of eliminating the competition based upon differences in labor standards can be accomplished without interfering with the employees' decision concerning union representation. There is some risk that this approach would encourage the kind of verbal evasions which I criticized earlier, but the danger can be eliminated by treating the union's objective as a question of fact which requires looking behind the ostensible purpose. Regardless of what the union may say, recognition is an objective of any picketing of an

unorganized shop, but the force of this presumption, based upon experience, can be dissipated by proof that the labor conditions of which the union complains are presently such an immediate and substantial threat to existing union standards in other shops through the force of competition as to support a finding that the union has a genuine interest in compelling the improvement of labor conditions or eliminating the competition even though the union does not become the bargaining representative." (Footnotes omitted.)

We agree with Solicitor General Cox that there is nothing in the law which prevents a union from protecting the standards of its members by either eliminating the non-union labor or requiring that non-union labor receive union wages and conditions. Solicitor General Cox does not tell us whether he envisages the union as having the right of picketing only until the owner of the non-union plant does in fact raise his wages to the union scale or whether the union can also secure a contract for the payment of union wages to non-union employees for a fixed term. It is completely unrealistic to require the union to maintain a vigil and resume picketing whenever wages drop. If the union can picket to compel the owner of a non-union plant to pay his non-union employees union wages, it would seem that the union can legally contract with the employer for the payment of union wages to non-union employees. And if a union can contract with an employer for the payment of union wages to non-union employees, it should be immaterial whether this occurs with respect to a plant which is wholly non-union or one in which the union has less than a majority of the members.

The Solicitor General Cox would limit such picketing to a situation where union standards are threatened by the competition of lower priced goods produced by non-union labor. But lower paid non-union employees are always a threat to the standards of union employees.

Here the employer was willing to give a five percent increase to all its employees by entering into a contract with the union for such an increase (R. 99). If the union was not legally privileged to enter into that contract without majority status, the legitimate aspirations of its members for an agreement for higher wages for a fixed term of years would have been defeated. It would have been defeated by the failure of the majority of the employees in the plant to join the union. The non-union majority would have kept the economic status of the union members below that which their economic strength could win for them.

To avoid this result is just as legitimate a basis for permitting the union members, though a minority, to bring up the wages of the non-union majority as would the Solicitor General's example of the right to raise the labor cost of producing lower priced goods which are driving down standards of union members.

The Board's brief (p. 12, n. 7) seems to assume that the minority union should contract for wage increases for its members only. But if that were done the Board might readily hold that such a contract encourages union membership contrary to Section 8 (a) (3) and (b) (2), unless it were construed as imposing an obligation on the employer to pay non-union employees the same rates, in which instance we would in substance have the contract which the Board has here ordered set aside.

The Board's brief seems to proceed upon the assumption that to the extent that an employer contracts with a union to fix the wages or conditions of employment of non-union members it recognizes the union as the representative of the non-union members. The Board's brief (p. 14) characterizes this as "top down" organizing. But our point is, as Solicitor General Cox clearly recognizes, that there is a difference between forcing non-union employees into an organization and giving them the benefit of union standards. The non-union employees are not forced to organize because they are given union conditions. The Board's failure to distinguish these two very different things led the Board to the conclusion that only when the non-union members constitute a minority in a union in which the majority have selected the union, can the union fix their wages and conditions of employment. This would completely exclude the situation which Solicitor General Cox in his above quoted monograph argues is legal and justifiable, namely, the right to fix wages and conditions of employment for a non-union majority to protect standards of union members. Nor does the Board point to anything in the statute itself, its legislative history or the Board or court decisions which exclude the right of the union to contract for wages and terms of employment for a non-union majority. On the contrary, we believe that the extensive analysis of the National Labor Relations Act and its legislative history showing Congress intended to preserve this traditional practice of trade unions,[1] as set out in our

[1] Since filing our main brief a new study entitled Collective Bargaining in the Basic Steel Industry, U. S. Dept. of Labor, 1961, pp. 232-233, has described the manner in which bargaining on a members only basis in that industry resulted in contracts fixing wages for all employees in the unit. See also Emily Clarke Brown, The New Collective Bargaining in Mass Production: Methods, Results, Problems, 47 Journ. Pol. Econ. 30, 35-37 (February 1939).

main brief, pages 62-92, stands completely unimpaired by anything in the Board's brief.

III.

There are no decisions by the National Labor Relations Board other than that in the instant case holding that exclusive recognition of a minority union without more constitutes an unfair labor practice or that employee efforts to secure such recognition do not constitute protected concerted activity.

The Board's brief fails to cite a single case other than the instant case in which the mere conferral of exclusive recognition upon a minority union was held by either the Board or the court to constitute an unfair labor practice. In most of the cases cited in the Board's brief for the proposition that an employer commits an unfair labor practice by granting exclusive recognition to a minority union, the grant of exclusive recognition was accompanied by a union security provision which Section 8 (a) (3) expressly bars with a minority union.[2] In all the other cases there was either a rival union claiming exclusive representation rights[3]

[2] There were union security clauses with a minority union in *Daniel Hamm Drayage Co.*, 84 N.L.R.B. 458, enforced 185 F. 2d 1020 (C.A. 5) and *Guy F. Atkinson Co.*, 90 N.L.R.B. 143, enforcement denied on other grounds, 195 F. 2d 141 (C.A. 9), both cited Board Brief, p. 15, n. 13; in *Dixie Bedding Mfg. Co.* v. *N.L.R.B.*, 208 F. 2d 901 (C.A. 5) cited Board Brief, p. 16; in *National Motor Bearing Co.*, 5 N.L.R.B. 409, enforced on this point, 105 F. 2d 652 (C.A. 9), *Stein and Calder*, 46 N.L.R.B. 129, *Sunbeam Corp.*, 99 N.L.R.B. 546; *John B. Shriver Co.*, 103 N.L.R.B. 23; *Safeway Stores, Inc.*, 111 N.L.R.B. 968, all five cited Board Brief, p. 16, n. 15; and in *N.L.R.B.* v. *Masters-Lake Success, Inc.*, 47 L.R.R.M. 2607, 2608 (C.A. 2), February 15, 1961, cited Board Brief, p. 17.

[3] There were rival unions claiming representation rights in *N.L.R.B.* v. *National Container Corp.*, 211 F. 2d 525 (C.A. 2), *District 50, United Mine Workers* v. *N.L.R.B.*, 234 F. 2d 565 (C.A.

or such employer domination of the recognized organization as to render it incapable of serving as a genuine employee representative.[4] Where an employer confers recognition on one of two rival unions claiming majority representation the Board and the courts have relied upon the disparate treatment as the type of employer interference with the employees' freedom to choose their own representative which the Act condemns. When there are not two unions, recognition does not carry this element of taking sides in a contest between two organizations. Moreover when it turns out that the employer recognized the minority union whereas the other union was the majority choice, the employer has violated his duty to bargain exclusively with the majority choice.

Every case cited in the Board's brief not only has present as a factual matter, but shows reliance upon, factors other than the mere grant of recognition to a minority union in finding an unfair labor practice.

Nor do we know of any case in which the Board has held that employee conduct directed at securing exclusive recognition for a minority union is not protected within the meaning of Section 7 of the Act. In each of the cases cited by the Board's brief (p. 15) for the proposition that strikes and picketing designed to compel recognition of a minority union are not protected by Section 7, the Board had held the conduct protected and ordered the reinstatement of employees

4). *Elastic Stop Nut Corp.* v. *N.L.R.B.*, 142 F. 2d 37 (C.A. 8) and *N.L.R.B.* v. *Corning Glass Works*, 204 F. 2d 422 (C.A. 1), all cited Board Brief, pp. 17-18.

[4] *N.L.R.B.* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 271, cited Board Brief, pp. 7, 8, 13, 29.

who went on such strikes or were discharged for such conduct. Thus in *N.L.R.B.* v. *Brashear Freight Lines*, 8th Cir., 1941, 119 F. 2d 379, cited in the Board's brief, p. 15, the Board ordered reinstatement of employees who struck in support of demands that their employer bargain with a minority union. The court (119 F. 2d at 382) refused to enforce reinstatement, apparently on the ground that like economic strikers, by going on strike, the employees took the chance of being replaced. We find no word in the court's decision which suggests that it would have been illlegal for the employer to bargain with a minority union or that striking to secure such bargaining was not a protected activity. See *N.L.R.B.* v. *Buzza-Cardozo*, 9th Cir., 1953, 205 F. 2d 889, 890, certiorari denied, 346 U.S. 923, where, in enforcing a Board order reinstating employees who without majority support struck for a wage increase, the court distinguished the *Brashear* case:

> "Respondent, relying on *N.L.R.B.* v. *Brashear Freight Lines*, 8 Cir., 119 F. 2d 379, contends that the concerted activity was a wildcat strike and as such unprotected. That case, however, is authority for no more than the proposition that the employees who struck did so at the risk of having their places filled with new employees during the pendency of the strike. There is a difference between an employer's duty not to discharge employees for striking and his right to deny reinstatement to economic strikers whose jobs he had filled during the course of the strike in order to continue his operations."

In both the cases of *Hoover Co.* v. *N.L.R.B.*, 6th Cir., 1951, 191 F. 2d 380 and *N.L.R.B.* v. *Electronics Equipment Co.*, 2nd Cir., 1952, 194 F. 2d 650, cited in the Board's brief, pp. 15-16, the Board had held employee

efforts to secure exclusive recognition for a labor organization protected even though a rival union was claiming representation rights, an election under the auspices of the Board was pending and in the *Hoover* case even after a rival union had been certified. While the courts refused to enforce the Board's orders insofar as they directed reinstatement of these employees, the courts were manifestly concerned with strike and boycott activity which sought recognition for one of two rival unions in defiance of pending Board elections or certifications.

So far as we have been able to ascertain the Board in recent years has recognized that a question may exist as to whether a strike for recognition of a minority union is a protected concerted activity, but has found it unnecessary to pass on the issue. See for instance *Ekco Products Co.*, 1957, 117 N.L.R.B. 137, 144, where the Board said:

> "As in any event, we find from the record that the Mine Workers represented a majority, we need not pass on the question whether a strike for recognition by a minority union is a protected concerted activity.[18]
>
> [18] Compare *N.L.R.B.* v. *Buzza-Cardozo*, 205 F. 2d 889 (C.A. 9) with *N.L.R.B.* v. *Braskear Freight Lines, Inc.*, 119 F. 2d 379 (C.A. 8)."

We respectfully submit that the broad assertions in the Board's brief, pp. 7, 12-19, that the Board has always held recognition of a minority union unlawful are not supported by the authorities cited.

IV.

The legislative history of the various appropriation riders and the subsequent Landrum-Griffin Act amendments do not establish that Congress meant by Section 8 (a) (1) and (2) or Section 8 (b) (1) (A) to ban exclusive recognition of minority unions.

The Board's brief (pp. 19-20) argues that the Congress by riders on the Board's appropriations from 1944 to 1948 placing a three months statute of limitations on complaints to invalidate any contract between management and labor, showed that Congress regarded exclusive recognition of minority unions as unlawful. The Board, however, cites nothing from the legislative history of these riders and we have been unable to find anything which indicates that Congress was concerned about exclusive recognition of minority unions as such. As the Board's brief, p. 20, indicates, the riders were originally designed to prevent the Board from setting aside closed shop contracts with Kaiser Shipbuilding Corporation, even though the contracts were entered into when only a mere handful of the potential work force had been hired. In enacting the riders Congress expressly placed stability of collective bargaining agreements ahead of even the right to work without joining a union (89 Cong. Rec. 6566-6567). While in 1948 the rider was narrowed to impose such a statute of limitations only on agreements between employers and unions designated by a majority, there is no logical inference that Congress had in mind exclusive recognition of unassisted minority unions which were engaged in genuine arm's length bargaining. There were several other clearly recognized unfair labor practices to which the limitation was directed, as for instance union security agreements with minority unions or contracts with company dominated unions.

The reference to "sweetheart" contracts, which the Board's brief (p. 20) quoted, covers a concept of employer collusion with a minority union completely inconsistent with genuine arm's length bargaining with a minority union.

Neither the fact that Congress by the Landrum-Griffith Act legalized prehire contracts nor the legislative history of this provision shows Congress regarded exclusive recognition of minority unions as illegal *per se*. Congress did take cognizance of the fact that the Board's decision in the instant case would prevent such prehire contracts and hence expressly legislated to avoid the application of the rule of the instant case in such circumstances. (See material quoted Board brief, p. 22). But referring to the instant case to explain the need for express legalization of prehire contracts cannot establish that Congress deemed the present case correctly decided.

The chief features of the prehire contract legalization are the union shop features and the hiring hall features which appear as Subparagraphs (2), (3) and (4) of Section 8 (f). The Board omits these provisions when it quotes from Section 8 (f), Board brief, p. 21, n. 18. When the legislative history is read in the context of legalizing a union shop and hiring hall arrangement with a union not selected by any employees, there can be no substantial weight to any assumption that Congress believed that, but for its newly

created exception, mere exclusive recognition of a minority union was illegal *per se*.

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SUPREME COURT OF THE UNITED STATES

No. 284.—October Term, 1960.

International Ladies' Garment Workers' Union, AFL–CIO, Petitioner, v. National Labor Relations Board and Bernhard-Altmann Texas Corporation.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 5, 1961.]

Mr. Justice Clark delivered the opinion of the Court.

We are asked to decide in this case whether it was an unfair labor practice for both an employer and a union to enter into an agreement under which the employer recognized the union as exclusive bargaining representative of certain of his employees although in fact only a minority of those employees had authorized the union to represent their interests. The Board found[1] that by extending such recognition, even though done in the good-faith belief that the union had the consent of a majority of employees in the appropriate bargaining unit, the employer interfered with the organizational rights of his employees in violation of § 8 (a)(1) of the National Labor Relations Act and that such recognition also constituted unlawful support to a labor organization in violation of § 8 (a)(2).[2] In addition, the Board found that

[1] Except for filing an answer, the employer Bernhard-Altmann Texas Corporation did not resist enforcement of the Board's order and has not sought review in this Court.

[2] Section 8 (a)(1) and (2), insofar as pertinent, provide:

"It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: . . ." 61 Stat. 140, 29 U. S. C. § 158 (a)(1), (2).

the union violated § 8 (b)(1)(A)[3] by its acceptance of exclusive bargaining authority at a time when in fact it did not have the support of a majority of the employees, and this in spite of its bona fide belief that it did. Accordingly, the Board ordered the unfair labor practices discontinued and directed the holding of a representation election. The Court of Appeals, by a divided vote, granted enforcement, 280 F. 2d 616. We granted certiorari. 364 U. S. 811. We agree with the Board and the Court of Appeals that such extension and acceptance of recognition constitute unfair labor practices, and that the remedy provided was appropriate.

In October 1956 the petitioner union initiated an organizational campaign at Bernhard-Altmann Texas Corporation's knitwear manufacturing plant in San Antonio, Texas. No other labor organization was similarly engaged at that time. During the course of that campaign, on July 29, 1957, certain of the company's Topping Department employees went on strike in protest against a wage reduction. That dispute was in no way related to the union campaign, however, and the organizational efforts were continued during the strike. Some of the striking employees had signed authorization cards solicited by the union during its drive, and, while the strike was in progress, the union entered upon a course of negotiations with the employer. As a result of those negotiations, held in New York City where the home offices of both were located, on August 30, 1957, the employer and union signed a "memorandum of understanding." In that memorandum the company recognized the union as

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[3] Section 8 (b)(1)(A) provides in pertinent part:

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7. . . ." 61 Stat. 141, 29 U. S. C. § 158 (b)(1)(A).

exclusive bargaining representative of "all production and shipping employees." The union representative asserted that the union's comparison of the employee authorization cards in its possession with the number of eligible employees representatives of the company furnished it indicated that the union had in fact secured such cards from a majority of employees in the unit. Neither employer nor union made any effort at that time to check the cards in the union's possession against the employee-roll, or otherwise, to ascertain with any degree of certainty that the union's assertion, later found by the Board to be erroneous,[4] was founded on fact rather than upon good faith assumption. The agreement, containing no union security provisions, called for the ending of the strike and for certain improved wages and conditions of employment. It also provided that a "formal agreement containing these terms" would "be promptly drafted . . . and signed by both parties within the next two weeks."

Thereafter, on October 10, 1957, a formal collective bargaining agreement, embodying the terms of the August 30 memorandum, was signed by the parties. The bargaining unit description set out in the formal contract, although more specific, conformed to that contained in the prior memorandum. It is not disputed that as of execution of the formal contract the union in fact represented a clear majority of employees in the appropriate unit.[5] In upholding the complaints filed against the em-

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[4] The Board found that as of August 30 the union in fact had authority to represent either 70 employees out of a relevant total of 280, or 158 out of 368, depending upon the criteria used in determining employee eligibility. "Accordingly, the Union could not, under any circumstances, have represented a majority of the employees involved on August 30, 1957." 122 N. L. R. B. 1289, 1291–1292.

[5] The Court of Appeals considered irrelevant the achievement of majority status during the period that the union maintained the unlawful agreement. 280 F. 2d 616, 619, note 3.

ployer and union by the General Counsel, the Board decided [6] that the employer's good-faith belief that the union in fact represented a majority of employees in the unit on the critical date of the memorandum of understanding was not a defense, "particularly where, as here, the Company made no effort to check the authorization cards against its payroll records." 122 N. L. R. B. 1289, 1292. Noting that the union was "actively seeking recognition at the time such recognition was granted," and that "the Union was [**not**] the passive recipient of an unsolicited gift bestowed by the Company," the Board found that the union's execution of the August 30 agreement was a "direct deprivation" of the nonconsenting majority employees' organizational and bargaining rights. At pp. 1292, 1293, note 9. Accordingly, the Board ordered the employer to withhold all recognition from the union and to cease giving effect to agreements entered with the union; [7] the union was ordered to cease acting as bargaining representative of any of the employees until such time as a Board-conducted election demonstrated its majority status, and to refrain from seeking to enforce the agreements previously entered.

The Court of Appeals found it difficult to "conceive of a clearer restraint on the employees' right of self-organization than for their employer to enter into a collective-bargaining agreement with a minority of the employees." 280 F. 2d, at 619. The court distinguished our decision in *Labor Board v. Drivers Local Union No. 639 (Curtis Bros.)*, 362 U. S. 274, on the ground that there was

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[6] Member Fanning agreed with a majority of the Board that the employer violated § 8 (a) (1) and (2), but dissented as to the finding of union violation of § 8 (b) (1) (A). 122 N. L. R. B. 1289, 1297.

[7] However, the terms and conditions of employment fixed by the agreement were not required to be varied or abandoned. We take it that the Board's order restraining the union and employer from dealing will, in any event, terminate after the election is held.

involved here neither recognitional nor organizational picketing. The court held that the bona fides of the parties was irrelevant except to the extent that it "was arrived at through an adequate effort to determine the true facts of the situation." At p. 622.

At the outset, we reject as without relevance to our decision the fact that, as of the execution date of the formal agreement on October 10, petitioner represented a majority of the employees. As the Court of Appeals indicated, the recognition of the minority union on August 30, 1957, was "a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative." 280 F. 2d, at 621. It is, therefore, of no consequence that petitioner may have acquired by October 10 the necessary majority if, during the interim, it was acting unlawfully. Indeed, such acquision of majority status itself might indicate that the recognition secured by the August 30 agreement afforded petitioner a deceptive cloak of authority with which to persuasively elicit additional employee support.

Nor does this case directly involve a strike. The strike which occurred was in protest against a wage reduction and had nothing to do with petitioner's quest for recognition. Likewise, no question of picketing is presented. Lastly, the violation which the Board found was the grant by the employer of exclusive representation status to a minority union, as distinguished from an employer's bargaining with a minority union for its members only. Therefore, the exclusive representation provision is the vice in the agreement, and discussion of "collective bargaining," as distinguished from "exclusive recognition," is pointless.[4] Moreover, the insistence that we hold the

[4] Relying upon reference to § 9 decertification proceedings, petitioner contends that such a contract with a minority union does not prevent employees from exercising complete freedom. The availability of such a remedy is doubtful in view of the Board's position that

labor practices here involved. The act made unlawful by § 8 (a)(2) is employer support of a minority union. Here that support is an accomplished fact. More need not be shown, for, even if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith.[12]

This conclusion, while giving the employee only the protection assured him by the Act, places no particular hardship on the employer or the union. It merely requires that recognition be withheld until the Board-conducted election results in majority selection of a representative. The Board's order here, as we might infer from the employer's failure to resist its enforcement, would apparently result in similarly slight hardship upon it. We do not share petitioner's apprehension that holding such conduct unlawful will somehow induce a breakdown, or seriously impede the progress of collective bargaining. If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate—precisely what Bernard-Altmann and petitioner failed to do here—he can readily ascertain their validity and obviate a Board election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well analyzed employer records with union listings or authorization cards. Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so. Moreover, no penalty is attached to the violation. Assuming that an employer in good faith accepts or rejects a union claim of majority status, the validity of his decision may be tested in an

[12] See *Labor Board* v. *Perfect Circle Co.*, 162 F. 2d 566; *Labor Board* v. *Illinois Tool Works*, 153 F. 2d 811; *McQuay-Norris Mfg. Co.* v. *Labor Board*, 116 F. 2d 748; and cf. *Labor Board* v. *Industrial Cotton Mills*, 208 F. 2d 87.

unfair labor practice proceeding.[13] If he is found to have erred in extending or withholding recognition, he is subject only to a remedial order requiring him to conform his conduct to the norms set out in the Act, as was the case here. No further penalty results. We believe the Board's remedial order is the proper one in such cases. *Labor Board* v. *District 50 U. M. W.*, 355 U. S. 453.

Affirmed.

[13] Section 8 (a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . ." 61 Stat. 141, 29 U. S. C. § 158 (a)(5).

SUPREME COURT OF THE UNITED STATES

No. 284.—October Term, 1960.

International Ladies' Garment Workers' Union, AFL–CIO, Petitioner, v. National Labor Relations Board and Bernhard-Altmann Texas Corporation.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 5, 1961.]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting in part.

I agree that under the statutory scheme, a minority union does not have the standing to bargain for all employees. That principle of representative government extends only to the majority. But where there is no majority union, I see no reason why the minority union should be disabled from bargaining for the minority of the members who have joined it.[1] Yet the order of the Board, now approved, enjoins petitioner union from acting as the exclusive bargaining representative "of any of the employees," and it enjoins the employer from recognizing the union as the representative of "any of its employees."

We have indicated over and again that, absent an exclusive agency for bargaining created by a majority of workers, a minority union has standing to bargain for its members. In *Virginian R. Co.* v. *Federation*, 300 U. S.

[1] The collective bargaining agreement in the present case undertakes to make the union "the sole and exclusive bargaining representative" for all workers in the bargaining unit. Article II. But the agreement also contains a separability clause—that if "any provision" is held "invalid," the remainder of the agreement is not affected. Article XXIX.

515, 549, note 6, the Court quoted with approval a concession that "If the majority of a craft or class has not selected a representative, the carrier is free to make with anyone it pleases and for any group it pleases contracts establishing rates of pay, rules, or working conditions."

That case was under the Railway Labor Act. But it has been followed under the National Labor Relations Act. In *Edison Co.* v. *Labor Board*, 305 U. S. 197, a union, the Brotherhood of Electrical Workers, was allowed to act as a bargaining representative for the employees who were its members, even though they were a minority. The Court said, ". . . in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had the right to make their own choice." *Id.*, 237. Maintenance of the status of a minority union, until an election was held, might well serve the purpose of protecting commerce "from interruptions and obstructions caused by industrial strife." *Id.*, 237. A decree requiring the employer from ceasing to recognize the Brotherhood as the exclusive representative of its members was modified:

> "The contracts do not claim for the Brotherhood exclusive representation of the companies' employees but only representation of those who are its members, and the continued operation of the contracts is necessarily subject to the provision of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of 'representation' should arise. We construe [the order] as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the [union] should be established in accordance with the Act." *Id.*, 239.

It was in that tradition that we recently sustained the right of a minority union to picket peacefully to compel

recognition. *Labor Board* v. *Drivers Local Union*, 362 U. S. 274. There a minority union sought to compel exclusive representation rights. To be sure, this Court recognized in that case that "tension exists between . . . [the] right to form, join or assist labor organizations and [the] right to refrain from doing so." *Id.*, 280. But when a minority union seeks only to represent its own, what provision of the Act deprives it of its right to represent them, where a majority have not selected another union to represent them?

Judge Learned Hand in *Douds* v. *Local 1250*, 173 F. 2d 764, 770, stated that "the right to bargain collectively and the right to strike and induce others to do so, are derived from the common law; it is only in so far as something in the Act forbids their exercise that their exercise becomes unlawful." In that case a minority union was recognized as having standing in a grievance proceeding outside the collective bargaining agreement, even where a majority had chosen another union. See *American Foundries* v. *Tri-City Council*, 257 U. S. 184.

Honoring a minority union—where no majority union exists or even where the activities of the minority union do not collide with a bargaining agreement—is being respectful of history. Long before the Wagner Act, employers and employees had the right to discuss their problems. In the early days the unions were representatives of a minority of workers.[2] The aim—at least the hope—

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[2] Twentieth Century Fund, How Collective Bargaining Works (1942), p. 24; U. S. Dept. of Labor Information Bulletin, Vol. 5, No. 6 (1938), pp. 5–8. For examples of such "members only" contracts, see, *e. g.*, 2 L. R. R. Man. 964, 967. See also Union Recognition as Shown in Contracts, 14 L. R. R. Man. 781–787: "The beginning point of collective bargaining in labor relations is the recognition by an employer of the other party to any contract entered into as the party representing employees . . . . [U]nion-recognition clauses, as embodied in most recent contracts generally fall into two different patterns. In some contracts, the union is recognized as the exclusive

of the legislation was that majority unions would emerge and provide stabilizing influences. Yet I have found nothing in the history of the successive measures, starting with the Wagner Act, that indicates any purpose on the part of Congress to deny a minority union the right to bargain for its members when a majority have not in fact chosen a bargaining representative.[3]

I think the Court is correct insofar as it sets aside the exclusive recognition clause in the contract. I think it is incorrect in setting aside the entire contract. *First*, that agreement secured valuable benefits for the union's members regarding wages and hours, work standards and distribution, discharge and discipline, holidays, vacations, health and welfare fund, and other matters. Since there was no duly selected representative for all the employees authorized in accordance with the Act, it certainly was the right of the employee union members to designate the union or any other appropriate person to make this contract they desired. To hold the contract void as to the union's voluntary members seems to me to go beyond the competency of the Board under the Act and to be unsupported by any principle of contract law. Certainly there is no principle of justice or fairness with which I am familiar that requires these employees to be stripped of the benefits they acquired by the good-faith bargaining of their designated agent. Such a deprivation gives no protection to the majority who were not members of the

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bargaining agent for all employees. In others, the union is recognized as bargaining agent for those employees only who are or may become members of the union."

[3] The Board has frequently recognized that recognition of a minority union as representative of its members only was not an unfair labor practice, absent the choice by a majority of a different bargaining representative. See *Solvay Process Co.*, 5 N. L. R. B. 330, 340; *Hoover Co.*, 90 N. L. R. B. 1614, 1618. And see *Cleveland Worsted Mills Co.*, 43 N. L. R. B. 545; *Black Diamond S. S. Corp.* v. *Labor Board*, 94 F. 2d 875.

union and arbitrarily takes from the union members their contract rights.

Second, the result of today's decision is to enjoin the employer from dealing with the union as the representative of its own members in any manner, whether in relation to grievances or otherwise, until it is certified as a majority union. A case for complete disestablishment of the union cannot be sustained under our decisions. While the power of the Board is broad, it is "not limitless." *Labor Board* v. *Mine Workers*, 355 U. S. 453, 458. Thus a distinction has been taken between remedies in situations where a union has been dominated by the employer and where unions have been assisted but not dominated. *Id.*, 458–459.

The present case is unique. The findings are that both the employer and the union were in "good faith" in believing that the union represented a majority of the workers. Good-faith violations of the Act are nonetheless violations; and the present violation warrants disestablishment of the union as a majority representative. But this good-faith mistake hardly warrants full and complete disestablishment, heretofore reserved for flagrant violations of the Act. Its application here smacks more of a penalty than of a remedial measure.

I think this union is entitled to speak for its members until another union is certified as occupying the bargaining field. That is its common-law right in no way diluted or impaired by the Act.